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ATTORNEY-CLIENT PRIVILEGE

United States v. Nicholas: Expanding the *Upjohn* Suppression Remedy

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A 19-page suppression order recently issued by the U.S. District Court for the Central District of California in *United States v. Nicholas*[1] has injected even more Hollywood drama into the headline-grabbing prosecution of several former Broadcom Corp. executives for alleged stock-options backdating.[2]

[1] *United States v. Nicholas*, Docket no. 338, Case No. 8:08-00139 (C.D. Cal.) (April 1, 2009 order suppressing privileged communications).

[2] The case has garnered national attention in part because of the high-profile and notorious reputation of Broadcom co-founder Henry Nicholas. Nicholas was also recently charged with drug trafficking offenses. His legal battles and his alleged personal struggles have been widely reported in the popular press. See, e.g., Bethany McLean, *Dr. Nicholas and Mr. Hyde: Sex, Lies, and Underground Lairs*, Vanity Fair, November 2008, available at: http://www.vanityfair.com/politics/features/2008/11/nicholas200811?currentPage=1.

One of the co-defendants in the backdating case—Broadcom co-founder Henry Samueli—also received consider-

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The suppression order (the ''Order'') confirms and expounds upon a bench decision issued Feb. 25, 2009, at the conclusion of a three-day evidentiary hearing. The purpose of the hearing was to determine whether statements made by former Broadcom Chief Financial Officer William J. Ruehle to attorneys at the law firm of Irell & Manella LLP (''Irell'') on and after June 1, 2006, were covered by Ruehle's personal attorney-client privilege and whether Irell should have disclosed such statements to Ernst & Young and the U.S. Attorney's Office on Broadcom's behalf.

The court held that even though Irell was not technically representing Ruehle, Ruehle's statements to Irell were nonetheless protected by the attorney-client privilege and were disclosed without his consent. Therefore, Ruehle's statements, memorialized in various documents, must be suppressed. The Order is consistent with an earlier protective order issued by a special master in the ongoing civil derivative litigation involving Broadcom.[3] The Order goes further than the protective order, however, in that it expresses doubt that Ruehle ever received an *Upjohn* warning, finds three ''clear violations'' of ethical rules by the Irell lawyers, and announces the court's intention to refer the Irell lawyers to California Bar Counsel for ''appropriate discipline.''

Strategy Was Threefold. As explored in greater detail below, Ruehle's strategy in meeting his burden of proving that a personal privilege attached to his communications with corporate counsel was threefold. At the hearing, he (1) denied that he received an *Upjohn* warning, (2) attacked the substance of the *Upjohn* warning that Irell contended that it gave, and (3) painted a detailed picture of Irell's extensive history of representing him (individually) and Broadcom.

The *Nicholas* ruling is notable for a variety of reasons, including its potential to significantly impact the way investigatory counsel approaches internal investigations going forward. At a minimum, the Order counsels defense practitioners to scrutinize the content and method of delivery (oral versus written) of their typical *Upjohn* warning and to consider the need for a written conflicts waiver at the outset of every investigatory interview. The remainder of this article will explore the Order's implications with respect to *Upjohn* warnings and offer practical tips for warning witnesses. An in-depth examination of the court's finding of ethical breaches is beyond the scope of this article.

Legal and Factual Underpinnings of Suppression Order

General Legal Principles at Play in *Nicholas*. By way of background, *Upjohn* warnings derive their name from the seminal case of *Upjohn v. United States*, 449 U.S. 383, 391-92 (1981), which established that the corporate attorney-client privilege applies to a wider group of corporate constituents than just the corporation's control group. The purpose of *Upjohn* warnings, occasionally also called ''corporate *Miranda* warnings,'' is to clarify that corporate counsel represents the corporation (here, Broadcom) rather than the constituent (here, Ruehle) and to explain the contours of the corporate attorney-client privilege to the constituent. The corporate attorney-client privilege belongs solely to the corporation, and the corporate entity has full discretion to waive or assert its privilege.

Only rarely can a constituent create a personal attorney-client privilege applicable to communications with corporate counsel about corporate matters.[4] This is so regardless of whether the executive is personally represented by corporate counsel in a dual representation scenario. Even if an executive establishes a personal attorney-client relationship with corporate counsel, only communications that occurred for the purpose of seeking personal legal advice would qualify for personal privilege protection.[5] Communications about corporate affairs are typically deemed communications of the corporation unless there is an indication, such as an express focus on the executive's personal liability, that the communication is not being rendered on the company's behalf.[6]

High-Ranking Executives Complicate Matters. Most lawyers will agree that the concept of the organizational client can be complicated for at least some corporate constituents.[7] The *Nicholas* ruling suggests that very high-ranking employees might find this conceptually more difficult than lower-level employees because the former are more likely to have past litigation experience in which they were represented personally by the company's lawyer. The outcome in *Nicholas* may signify that high-level employees who challenge the adequacy or the existence of *Upjohn* warnings in the future may be given increased deference because of,

able media attention at the end of 2008 when the judge rejected his proposed plea agreement with prosecutors as being too lenient. The proposed agreement contemplated Samueli paying a $12 million fine and receiving five years of probation with no jail time. In rejecting the agreement, the court stated that the proposed deal would ''erode the public's trust in the fundamental fairness of our justice system'' and ''suggests that Dr. Samueli's wealth and popularity will allow him to avoid the consequences of his alleged misconduct at Broadcom.'' The court said that it could not ''accept a plea agreement that gives the impression that justice is for sale.''

[3] *In re Broadcom Corp. Derivative Litigation*, Docket no. 272, Case no. 2:06-cv-03252 (C.D. Cal.) (Jan. 9, 2009 order upholding Ruehle's personal privilege and requiring destruction or return of documents and limiting the further use or disclosure of the documents or their contents).

[4] See John W. Gergacz, *A Proposal for Protecting Executive Communications with Corporate Counsel After the Corporate Client Has Waived its Attorney-Client Privilege*, 13 Fordham J. Corp. & Fin. L. 35, 51 (2008).

[5] *Id.*

[6] *Id.* (citing *In re Grand Jury Proceedings*, 156 F.3d 1038, 1041 (10th Cir. 1998) (''For example, a corporate officer's discussion with his corporation's counsel can still be protected by a personal, individual attorney-client privilege when the conversation *specifically concerns* the officer's personal liability for jail time based on conduct interrelated with corporate affairs.'')) (emphasis added).

[7] See, e.g., Brian Martin, *Know Your Client; Understanding the GC-management team relationship is critical to an ethical legal department*, Inside Counsel, January 2009, at 10 (The notion of the corporate client divorced from personal representation of its employees ''is absolutely foreign to . . . corporate constituents. This nuanced conception of the client stands in stark contrast to the common portrayal and understanding of the attorney-client relationship, replete with expectations of an absolute duty of confidentiality.'').

  WCR ISSN 1559-3185

rather than in spite of, their sophistication. See generally, *United States v. Nicholas*, Order at 10 (''Mr. Ruehle testified that had he understood that the Irell lawyers might disclose his statements to third parties, '[he] . . . would have stopped and asked some very serious questions at the time.' Mr. Ruehle was an experienced corporate officer and had substantial prior experience with civil litigation. . . . [H]e would never have agreed to provide information that Irell could then turnover to the Government . . . .'').[8]

The court interpreted Ruehle's failure to ask Irell about the details of its representation of the company as a sign that no *Upjohn* warning was given.[9]

This inference is radically different from the one the government urged the court to draw in light of Ruehle's background and aggressive disposition—i.e., Ruehle's silence signaled his understanding that Irell represented Broadcom in the relevant matter.[10]

Firm's Ties to Corporation, Executive. It is hard to overstate the impact of Irell's relationships (past *and* present) with Ruehle and Broadcom on the court's analysis. In 1997, Irell purchased 225,000 pre-initial public offering shares of Broadcom stock. The aggregate purchase price of the stock was $1,050,000, or $4.67 per share. Broadcom's share price increased dramatically after the company went public in early 1998, at some points trading above $70 per share. The sale of stock to Irell is described in the first footnote of the Order, revealing, perhaps, a belief by the court that Irell was predisposed for financial reasons to favor Broadcom over Ruehle in any conflict of loyalties.

Irell's prior representations of Broadcom and Ruehle covered multiple areas of the law and spanned several years. Relative to this case, there were three key representations. All three representations focused on Broadcom's historical stock-option granting practices. The first was a class action case filed in March 2006 and amended on May 25, 2006 to add Ruehle as a defendant and to include allegations of options backdating. The second was a shareholder derivative lawsuit filed on May 26, 2006 containing allegations regarding options backdating. The Order finds that Irell represented both Broadcom and Ruehle in those matters. Testimony at the hearing reflected that Irell withdrew from representing Ruehle in both matters in the September to October 2006 time frame. The third was an internal investigation, termed an ''equity review'' by Irell and the government, in which Irell represented Broadcom's audit committee in investigating Broadcom's accounting for option grants.[11] At least one of the two Irell partners handling the equity review also appears to have had responsibilities in the options-related civil cases.[12] The court suppressed documents reflecting statements that Ruehle made to the two Irell partners handling the equity review on June 1, 2006 and later that month concerning stock-option granting practices. Irell disclosed the statements to Ernst & Young in August 2006, and then to the government in 2007 and 2009.

Irell and the government contended that Ruehle made the statements in connection with the equity review; thus, they should be viewed under a different lens consistent with Ruehle's understanding of that engagement. The court ignored this distinction[13] and focused on the similar facts underlying all three representations. The Order does not address Ruehle's role on Broadcom's audit committee and Irell's contentions that, by virtue of this position, Ruehle fully understood the purpose of equity review and the likelihood that Irell's findings during the equity review would be disclosed to Ernst & Young in connection with Broadcom's eventual restatement of earnings. Rather, the ruling accepts the proposition advanced by Ruehle that his communications with Irell in the June 2006 time frame and thereafter related to the development of defenses in the derivative and class action cases.

Alleged *Upjohn* Warning 'Woefully Inadequate.' The court expressed ''serious doubt[ ]'' that any *Upjohn* warning was given and called the warning that Irell testified to ''woefully inadequate under the circumstances.''[14] Irell testified that it gave the following *Upjohn* warning:

> A: I mentioned in the *Upjohn* or civil *Miranda* warning that I gave to Mr. Ruehle at the outset of the first sort of fact or process interview that we met with him, that it was a possibility that there could be administrative investigations that arose out of this, and that in that instance, it would be a company privilege and it would not be his privilege. * * * *
>
> Q: Did you explain to him that companies often waive the privilege in government investigations and are asked to summarize the details of interviews with employees?
>
> A: No, but I told him that sometimes companies do take the position that they're going to cooperate with the government entities, and in that instance he would not have the privilege.[15]

The court found Irell's alleged warning deficient in three respects.[16] First, and ''most importantly,'' the court found that Irell failed to explain that Ruehle's

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[8] The court's finding at the evidentiary hearing was more colorful. See transcript of evidentiary hearing at 18-19 (Feb. 25, 2009), where the court said, ''I can't believe that Mr. Ruehle knew, in 2006, that information arguably incriminating to him that could be used by the government in a criminal prosecution would be disclosed by [Irell] . . . to the government. *Any reasonable person would scream*.'' (emphasis added).

[9] *United States v. Nicholas,* Order at 11 (''. . . the Court has serious doubts whether any Upjohn warning was given . . .'').

[10] *United States v. Nicholas*, transcript of evidentiary hearing at 96-97 (Feb. 24, 2009) (examination designed to establish that Ruehle was a ''smart and sophisticated executive'' who never shied from asking questions and thus understood the warning since he failed to ask questions about it).

[11] *United States v. Nicholas*, transcript of evidentiary hearing, Vol. 2 at 7-12 (Feb. 23, 2009) (describing purpose of the representation and how it was explained to the audit committee). As a member of the audit committee, Ruehle took part in discussions about the scope of the equity review. Irell testified that the audit committee was clearly informed that officers would need separate counsel if issues of self-dealing or management integrity arose during the equity review.

[12] *Id.* at 21.

[13] The term ''equity review'' never appears in the Order.

[14] *United States v. Nicholas,* Order at 11 (absence of written record of warning fueled court's skepticism that one was provided).

[15] *United States v. Nicholas,* evidentiary hearing at 50 (Feb. 23, 2009).

[16] *United States v. Nicholas,* Order at 11-12. The court's holding turned not on the perceived deficiencies, but on its view that not even a model *Upjohn* warning would have allowed Irell to sever its attorney-client relationship with Ruehle for the equity review. In fact, the court found that only a written conflicts waiver by Ruehle in respect of Broadcom would

statements could be shared with third parties, including the government in a *criminal investigation*. Second, the court found that the Irell lawyers failed to explain that they were not Ruehle's counsel, at least for purposes of the equity review. Third, the court found that Irell failed to advise Ruehle that he should consult with another lawyer.[17]

The Irell lawyers admitted failing to tell Ruehle that they did not represent him,[18] but they disputed the significance of this omission generally and in light of Ruehle's role in the equity review. See transcript of evidentiary hearing at 62-63 (Feb. 24, 2009) (testimony of Irell partner) (''telling an employee at a company at the beginning of an interview, 'We represent the company and not you,' that wouldn't really accomplish very much''). In fairness, Irell also stated that it was essential for the witness to understand that the company controlled the secrecy of his or her communications; i.e., without that understanding, the disclaimer as to whom the lawyer represents is meaningless. While Irell's emphasis on the control feature of the privilege may be correct, it ignores the link between a witness's understanding of control and his or her knowledge of who the lawyer represents. Authorities agree that it is essential to identify the client before beginning the interview.[19]

Reasonable Belief in Existing Attorney-Client Privilege. As is common, the *Nicholas* court applied a reasonable belief standard in evaluating Ruehle's claim that he believed he was consulting Irell as his personal counsel.[20] In determining whether Ruehle's stated expectations were reasonable, the court's focus on ''all kinds of indirect evidence and contextual considerations'' allowed it to find a personal privilege where others have not.[21]

In the recent case *In re Grand Jury Subpoena Under Seal v. United States*, 415 F.3d 333 (4th Cir. 2005), which upheld the denial of a motion to quash based on ''watered-down'' *Upjohn* warnings, the Fourth Circuit applied a reasonable belief standard.[22] Unlike *Nicholas*, the Fourth Circuit expressly sought to construe the privilege narrowly. With that principle in mind, the court found no evidence of an objectively reasonable, mutual understanding that the appellants were seeking legal advice from the investigating attorneys or that the investigating attorneys were rendering personal legal advice.[23] Clearly, the contextual considerations used by the Fourth Circuit in evaluating reasonable belief varied from the ones used in *Nicholas*.[24]

The result in *Nicholas* will likely embolden similarly situated defendants across the country. Accordingly, counsel must understand the implication of *Nicholas* for corporate investigations going forward.

Implication of *Nicholas*: Raising the Stakes for Everyone

Prosecutors and defense attorneys alike can find plenty to decry in the *Nicholas* opinion. In ruling from the bench, the court declared it a sad day for justice and summed up two obvious problems flowing from the suppression remedy—the government's inability to use the evidence against Ruehle and other Broadcom executives and the corresponding devaluation of Broadcom's cooperation in the eyes of the government:

> [N]ow you[, the government,] are finding yourself in a situation because of something that happened in 2006, you had no involvement, no dealings with, you're finding yourself, oh, my gosh, we're not going to be able to use this evidence. . . . I also feel sorry for Broadcom because Broadcom, now I assume they'll still get benefit, but they will not get the full benefit of cooperation with the government because the government cannot get the bang for the buck for the cooperation.[25]

On the bright side for defense counsel, greater attention on the suppression remedy may create a disincentive for the government to seek privilege waivers and for corporations to feel the need to waive privilege in order to receive cooperation credit. In short, *Nicholas* may give the government a reason to embrace the ideo-

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have allowed Irell to proceed in disclosing Ruehle's communications.

[17] *Id.*

[18] Likewise, they admitted that they did not advise Ruehle to obtain another lawyer.

[19] See, e.g., Dan K. Webb, Robert W. Tarun, and Steven F. Molo, *Corporate Internal Investigations* at 9-8 (''Prior to beginning any interview, counsel should warn the witness . . . who counsel represents . . . . If the interviewer represents the corporation and is interviewing an employee, counsel should make clear that counsel represents the company and not the employee (if that is the case) . . . .'').

[20] *United States v. Nicholas,* Order at 7 (''Determining whether an attorney-client relationship exists depends on the reasonable expectations of the client.'') (internal quotation marks and citation omitted).

[21] *Id.* at 8.

[22] Other jurisdictions have taken a similar, albeit more lenient, approach by adopting a standard of ''minimally reasonable'' belief. See, e.g., *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985), where the Seventh Circuit stated only that there must be ''some finding that the potential client's subjective belief is minimally reasonable.'' In contrast, there are courts that apply a more restrictive standard for determining when communications between a corporate executive and corporate lawyers are subject to the executive's personal privilege. See John W. Gergacz, *Attorney-Corporate Client Privilege*, § 2.11 (3d ed. 2009) (citing *United States v. International Brotherhood of Teamsters*, 119 F.3d 210 (2d Cir. 1997) (refusing to apply a reasonable belief standard for determining whether the executive was represented by corporate counsel)).

[23] *In re Grand Jury Subpoena Under Seal*, 415 F.3d at 338.

[24] Other jurisdictions seem more in line with the Fourth Circuit. See, e.g., *In re Grand Jury Investigation,* 575 F. Supp. 777 (N.D. Ga. 1983) (adopting strict five-part test in evaluating reasonableness of belief). The discussion in *Nicholas* refers to some of the five factors. Notably missing is the requirement that the employee show that the substance of the communications did not concern matters related either to (1) his official duties within the company or (2) general affairs of the corporation. The court does not address whether there was an express focus on Ruehle's personal liability during his communications with Irell. Showing this would surely have proved hard for Ruehle in light of the famous Robert Vesco case in the Second Circuit. *In re Grand Jury Subpoena Duces Tecum,* 391 F. Supp. 1029 (S.D.N.Y. 1975) (dual representation was no bar to corporation's waiver of privilege as to matters involving the affairs of Vesco's corporation or embracing his role or activities as an officer or director).

The *Nicholas* opinion also fails to address constitutional considerations related to the privilege, the lack of wrongdoing on the part of the government, and why the aforementioned factors typically favor admission of otherwise privileged evidence. See, e.g., *United States v. White,* 970 F.2d 328, 335 (7th Cir. 1992).

[25] *United States v. Nicholas,* evidentiary hearing at 25, 82 (Feb. 25, 2009).

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logical shift recognized in the Justice Department's latest corporate charging guidelines, the Filip Memorandum. The Filip Memo focuses on the disclosure of ''relevant facts'' as opposed to privileged material in assessing the extent of a company's cooperation. On its face, it represents a departure from the culture of waiver fostered by DOJ's earlier guidelines and the Securities and Exchange Commission's Seaboard Report. The suppression remedy highlighted in *Nicholas* may make fact-based proffers more attractive to the government going forward.

A less obvious consequence stemming from *Nicholas* is defense counsel's increased liability risk arising from a corporate employee's misimpression that the attorney was representing the employee or that there was a ''communicator's privilege.'' Although not well established,[26] these types of claims may become increasingly common in the wake of *Nicholas*. One highly publicized example has already surfaced. A news report dated March 30, 2009 announced that Stanford Financial Group's chief investment officer, Laura Pendergest-Holt, filed a lawsuit against Stanford's outside counsel for legal malpractice, professional negligence, and breach of fiduciary duty after Pendergest-Holt was criminally charged with obstruction of justice for statements she made during an interview with the SEC in the presence of Stanford's corporate counsel.[27] Perdergest-Holt alleges that counsel implied that he represented her personal interests in a federal probe into an alleged $8 billion Ponzi scheme by Stanford, while actually protecting Stanford's other principals to her detriment.[28] Among other things, Pendergest-Holt claims that counsel never advised that she needed separate counsel for her SEC testimony or that her communications with him were not protected by the attorney-client privilege.[29]

Future Unclear. How the law will develop in this area in the future is unclear. What is certain is that the stakes are becoming increasingly higher for everyone involved in the internal investigations process. Attorneys conducting the interview would do well to re-evaluate their warnings to witnesses in light of *Nicholas* and with a full understanding of DOJ's latest guidelines.

Practical Lessons

Below are some practical considerations for issuing *Upjohn* warnings. What constitutes an appropriate *Upjohn* warning in any given case will depend upon the facts and circumstances. Nevertheless, there are basic principles to keep in mind at all times before, during, and after the interview.

Logistical Considerations

- Have more than one lawyer present during the witness interview.
- Mention the issuance of the warning in the contemporaneous notes summarizing the interview.
- Reduce the warning to a ''script'' and read it verbatim to the witness. Append the script to a typed interview summary (preferable) or to handwritten interview notes if a typed summary proves too difficult to complete.
- Consider furnishing the script to the witness for him or her to sign. The desirability of this may depend upon the stature and role of the witness and whether he or she has questions about the oral warning. Recognize the chilling effect that this may have on the interview and proceed accordingly.

Contents of the Warning

Watch for the issuance of detailed, final American Bar Association guidance on this subject. In 2008, the ABA's White Collar Crime Committee formed a task force to recommend best practices when providing *Upjohn* warnings. The task force is expected to make a final report later this year. Draft guidance includes this suggested *Upjohn* warning:

> I am a lawyer from Corporation A. I represent only Corporation A, and I do not represent you. I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed. Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.
>
> In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss[ ] *this* discussion.
>
> Do you have any questions?
>
> Are you willing to proceed?

In many cases, this form of warning should be sufficient to apprise employees of the scope and application of the attorney-client privilege.[30]

Additionally, prior to conducting interviews, attempt to determine which employees' interests are likely to diverge from those of the company and who has criminal exposure. Consider whether to advise those employees that they have a right to separate counsel and that their statements can be used against them. Although *Upjohn* warnings typically focus on preserving the integrity of the attorney-client relationship and the confidentiality of the communications, they can be used to warn

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[26] See Gergacz, *Attorney-Corporate Client Privilege*, supra, § 2.16 at 2-19 (''Attorney liability to nonclient third parties is a new and uncharted area. As a general rule, the lawyer's duty is owned to his client and the doctrine of privity provides a strong defense to third-party claims.''). See also *Nealy v. Hamilton*, 837 F.2d 210 (5th Cir. 1988) (dismissing executive's suit against corporate attorney for allegedly wrongfully divulging to government investigators communications that the executive thought were privileged).

[27] See Erin Fuchs, *Stanford Exec Sues Proskauer Atty For Malpractice*, Securities Law360, March 30, 2009.

[28] See *Pendergest-Holt v. Sjoblom*, No. 3:09-cv-00578, Compl., Docket no. 3 (N.D. Tex.).

[29] *Id.*

[30] Cf. Webb, *Corporate Internal Investigations*, supra, at 9-11 (endorsing similar sample warning). The ABA's sample warning comes from the task force's March 2, 2009 draft report.

against self-incrimination.[31] Following *Nicholas*, counsel may want to address self-incrimination as a matter of routine and certainly in cases where the employee is anticipated to have criminal exposure.

Dual-Representation Situations

Attorneys who represent both the company and its employees should be diligent about distinguishing what work is performed for each client. This will preserve personal privileges and leave the company free to disclose communications privileged as to it. In this regard, take steps to document any individual attorney-client relationships at the time of the interview or shortly thereafter. As one leading authority suggests, such documentation should ''clearly note that the communications were not being carried out in the employee's corporate role, but were made by him as an individual.''[32]

The following practices are also recommended: (a) individual billings, time records, and engagement contracts should reflect the individual attorney-client relationship; (b) correspondence should reflect the employee's corporate role for corporate communications and omit that role for other privileged communications; and (c) inform the corporation and the employee about the dual representation and the risks of conflicts of interest arising.[33]

In sum, while there is no ''one size fits all'' *Upjohn* warning, the foregoing tips should help counsel devise an appropriate strategy in each case.

[31] It is rare that counsel for a private company will be obliged to issue a *Miranda*-type warning to an employee. See Webb, *Corporate Internal Investigations*, supra, at 9-8 (''[R]equired warnings against self-incrimination are limited to situations involving custodial interrogations conducted by governmental agencies. If a private employer can be deemed to be acting as an agent for the government when conducting an investigation, it might be argued that a duty to warn against self-incrimination and the right to counsel exists. However, the private corporation must be acting essentially as an agent or instrument of the government for state action to be found.'').

[32] Gergacz, *Attorney-Corporate Client Privilege,* supra, § 2.12 at 2-16.

[33] *Id.*

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